No. 71-846

In the Supreme Court of the United States

OCTOBER TERM, 1971

ANTHONY M. STRAGUSA, PETITIONER

v.

UNITED STATES OF AMERICA

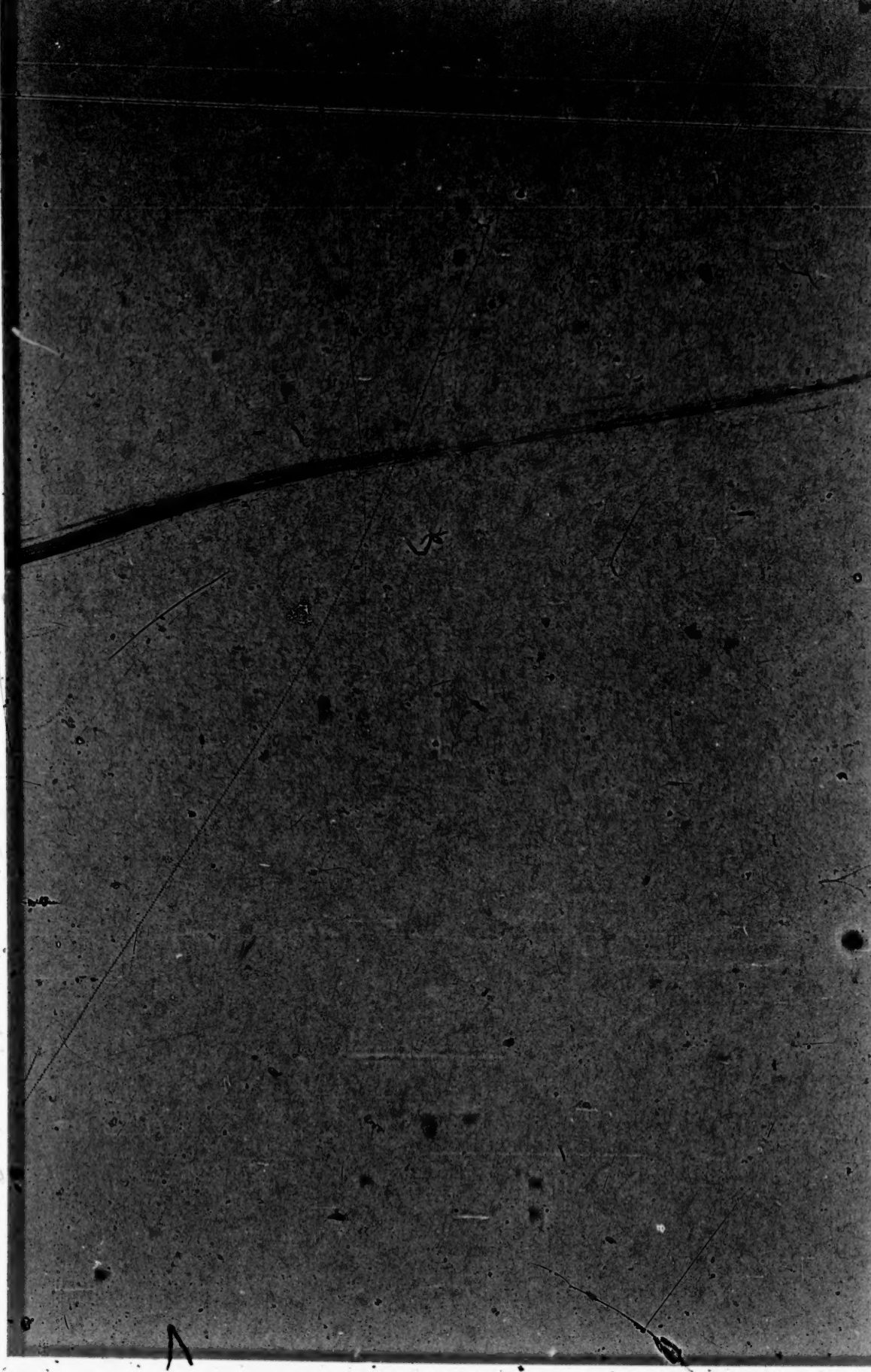
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General

SCOTT P. CRAMPTON,
Assistant Attorney General

MEYER ROTHWACKS,
JOHN P. BURKE,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530



In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-846

ANTHONY M. SIRAGUSA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1971 (Pet. App. C). On December 7, 1971, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to December 31, 1971, and the petition was filed on December 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

457 411—72

QUESTIONS PRESENTED

1. Whether prejudicial error occurred as a result of the unauthorized presence in the jury room of a 1970 Federal Income Tax Booklet, where the substance of the material in the booklet pertinent to the case had been introduced into evidence and included in instructions to the jury.

2. Whether the trial court correctly denied petitioner's request to instruct the jury that they must, where alternative inferences were possible from a fact or circumstance, adopt the inference pointing to innocence.

3. Whether the trial court erred in permitting the jurors to separate after commencing their deliberations.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions and statutes are set forth at Pet. App. D.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on three counts of having willfully attempted to evade a large part of his income tax for the years 1962 through 1964 by filing fraudulent tax returns, in violation of Section 7201 of the Internal Revenue Code of 1954. He was sentenced to concurrent 30-day prison sentences on each count, and fined a total of $11,000. The court of appeals affirmed (Pet. App. A).

The government used the bank deposits method, and showed that petitioner's income tax returns understated his true income by more than $22,000, and his true tax by more than $7,000, during the three-year period in question (Govt. Ex. 30). There was also direct proof that, of the $22,000 understatement of income, some $7,100 consisted of unreported interest income realized on 23 separate savings accounts (Govt. Ex. 32). Petitioner did not testify; he urged as a defense that although there were understatements of income, they were not willful.

The jury began deliberations at 2:45 p.m. on Thursday, January 28, 1971. When a verdict had not been reached by 5:25 p.m., the jury was excused and allowed to separate, with instructions to resume deliberations at 10:00 a.m. the next day (App. 51A). Defense counsel stated that he had no objection to this overnight separation (App. 40A, 41A). No verdict was reached on Friday, January 29, and at 5:25 p.m. on that day an adjournment was taken until 10:00 a.m. Monday, February 1, 1971 over the objection of petitioner (App. 66A, 70A). The jurors were again allowed to separate and to go to their respective homes for the weekend (App. 72A). The verdict of guilty was returned on the afternoon of Monday, February 1, 1971 (App. 87A–88A).

After the jury was discharged, a 1970 Federal Income Tax Booklet of instructions for preparing 1970 individual income tax returns, of the kind sent out

---

References designated "App." are to the appendix in the court below.

annually to all federal income taxpayers, was discovered in the jury room (App. 86A, 108A–174A). This document had not been received in evidence. A pencil mark bracketed a portion of the book, which stated (App. 130A): "You must report any interest you received or which was credited to your account (whether entered in your passbook or not) and which you can withdraw."

ARGUMENT

1. The presence of the booklet in the jury room did not, as petitioner argues (Pet. 9–12), require a new trial. Petitioner's objection relates solely to the federal portion of the book. But the jury was instructed before and during the trial to disregard interest from all the institutions save the one officer at which petitioner maintained his bank accounts, regardless of whether petitioner presented his passbooks to the banks for entry of the interest amounts during the years in question (App. 23A, 98A–100A). As the court of appeals concluded, the book added nothing to the evidence and instructions already before the jury (Pet. App. A, p. A5). Compare *Spurgeon* v. *United States*, 331 F. 2d 325, 326 (C.A. 10th), certiorari denied, 377 U. S. 979.

2. Nor did the trial judge err in not charging the jury, as petitioner wanted (Pet. 14–16), that "[w]here facts or circumstances proved are susceptible of two inferences, one pointing to innocence and the other to guilt, you must adopt the inference pointing to innocence and acquit the defendant." This Court's

decision in *Holland* v. *United States*, 348 U.S. 121, makes clear that such an instruction is not required where, as here (App. 14A–15A, 16A, 20A), the jury is properly instructed on the standards for reasonable doubt. Indeed, the Court admonished that in that situation "such an additional instruction on circumstantial evidence is confusing and incorrect" (348 U.S. at 139–140).

3. Contrary to petitioner's contention (Pet. 12–14), the trial judge did not abuse his discretion in allowing the jury to separate over the weekend after they had commenced their deliberations. A majority of the jurors (10 to 2) had requested this action (App. 67A). The court of appeals correctly found no abuse of discretion in the circumstances here—"it was not a sensational trial or notorious defendant likely to arouse great public interest and danger of outside pressures," and a great deal of time and effort had already been spent (Pet. App. 2a–p. A5). Compare *Tyler* v. *United States*, 397 F.2d 565, 567, 569 (C.A. 5), certiorari denied, 394 U.S. 917; *United States* v. *Acuff*, 410 F.2d 463, 466–467 (C.A. 6), certiorari denied, 396 U.S. 830; *Cardarella* v. *United States*, 375 F.2d 222, 227–229 (C.A. 8), certiorari denied, 389 U.S. 882; *Hines* v. *United States*, 365 F.2d 649, 651 (C.A. 10).

Petitioner urges that after a case has been submitted to the jury separation should never be permitted, and claims that the holding below that this is a discretionary matter conflicts with *United States* v. *Panczko*, 353 F.2d 676 (C.A. 7), and *United States* v.